WHEREFORE, plaintiff, Richard Douglas Cannon, demands judgment against the defendants, Mentor Engineering Inc., Campana Systems and AXIS, and defendants John 9-12, being the fictitious names of persons and entities whose true identities are presently unknown, jointly and severally, for compensatory damages, exemplary and punitive damages, together with interest and costs of suit.

MELLA AND DIMIERO
Attorneys At Law
Attorneys for Plaintiff

By ____________________
ALFRED D. DIMIERO

Dated: August 22, 2003

**CERTIFICATION PURSUANT TO R.4:5-1**

I hereby certify that this matter is not the subject of any other action pending in any Court or pending arbitration proceeding, nor is any other action or arbitration contemplated. All parties known to plaintiff who should have been joined in this action, have been joined.

____________________
ALFRED D. DIMIERO

Dated: August 22, 2003

**DESIGNATED TRIAL ATTORNEY**

ALFRED D. DIMIERO, ESQ. is designated trial attorney.

**DEMAND FOR TRIAL BY JURY**

Plaintiff, Richard Douglas Cannon, hereby demands a trial by jury on all issues.

MELLA AND DIMIERO
Attorneys At Law
Attorney for Plaintiff
Richard Douglas Cannon

By: [signature]
ALFRED D. DIMIERO

Dated: August 22, 2003

**HEIM & McENROE**

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DAVID L. BURNETT

July 30, 2003

***VIA LAWYERS SERVICE***

Honorable Bryan D. Garruto, J.S.C.
Middlesex County Courthouse
1 Kennedy Square
New Brunswick, NJ 08903

**Re: Cannon v. E & D Auto Repair Towing, et al**
**Docket No.: MID-L-677-02**
**Our File Number: 73196242**
**Date of Loss: 09/06/2001**

Dear Judge Garruto:

Please accept this letter brief in opposition to plaintiff's Notice of Motion to File a Third Amended Complaint which is returnable on August 8, 2003. We represent defendant AAA-West Jersey/Midatlantic ("AAACWJ/MA").

Via this Motion plaintiff seeks to add a count against the AAA defendants for punitive damages alleging that these defendants:

> "did institute, implement, own, utilize and encourage methods, procedures and equipment for conducting emergency road service operations, which methods, procedures and equipment exposed the public, and in particular, plaintiff Richard Douglas Cannon, to an unreasonable risk of injury, in wanton and willful disregard of the rights and safety of plaintiff and the general public."

Exhibit B to plaintiff's Notice of Motion.

While we understand that permission to file amended pleadings is to be granted liberally, there must be some good faith basis to the pleading sought to be filed. R. 1: 4-8. In this instance, there is no good faith basis to the purported pleading. As such, we ask the Court to deny plaintiff's motion.

The law of the state of New Jersey sharply limits the circumstances in which punitive damages may be recovered. A defendant's conduct must be particularly egregious to support an award of punitive damages. "To warrant a punitive award, the defendant's conduct must have been wantonly reckless or malicious. There must be an intentional wrongdoing in the sense of an 'evil-minded act' or an act accompanied by a wanton and wilful disregard of the rights of another." Nappe v. Anschelewitz, Barr, Ansell & Bonello, 97 N.J. 37, 49, 477 A.2d 1224 (1984) (citing DiGiovanni v. Pessel, 55 N.J. 188, 191, 260 A.2d 510 (1970)).

Something more than the mere commission of a tort is always required. There must be circumstances of aggravation or outrage, which may consist of such a conscious and deliberate disregard of the interests of others that the tortfeasor's conduct may be called wanton and willful. Lacking this element, mere negligence, however gross, is generally held not to be enough. Nappe, supra, 97 N.J. at 50 (citing DiGiovanni, supra, 55 N.J. at 190 (quoting W. Prosser, Handbook on the Law of Torts '2, at 9-10 (2d ed. 1955)). A plaintiff must demonstrate a "deliberate act or omission with knowledge of a high degree of probability of harm and reckless indifference to consequences." Berg v. Reaction Motors Div., 37 N.J. 396, 414, 181 A.2d 487 (1962).

"The defendant, however, does not have to recognize that his conduct is 'extremely dangerous,' but a reasonable person must know or should know that the actions are sufficiently dangerous." Parks v. Pep Boys, 282 N. J. Supr. 1, 17, 659 A.2d 471 (App. Div. 1995) (citing McLaughlin v. Rova Farms, Inc., 56 N.J. 288, 306, 266 A.2d 284 (1970)). Willful and wanton misconduct signifies something less than an intention to hurt. McLaughlin, supra, 56 N.J. at 306. The standard can be established if the defendant knew or had reason to know of circumstances which would bring home to the ordinary reasonable person the highly dangerous character of his or her conduct. Ibid.

this accident. The very testimony of Gerard Taber belies plaintiff's theories. In the statement given by Mr. Taber to the investigating police officers on the date of the accident Mr. Taber mentions absolutely nothing about having been distracted at the time of the accident. See Exhibit A annexed to the Certification of Judith A. Heim submitted herewith.

Similarly, at his deposition taken on June 18, 2003 Mr. Taber testified he was not rushing at the time of the accident and that he had adequate time to get to his next service call. See Taber deposition of June 18, 2003 annexed to Heim Certification as Exhibit B. Regarding the issue of distraction, Taber testified that the Mentor MDT in his truck beeped once immediately preceding the accident and that he heard other cars beeping their horns. Thinking that he might be dragging a chain, he turned around to look at the bed of his truck to check that everything was in order and as he looked forward again, he saw plaintiff's vehicle, was not able to stop in time and struck plaintiff's vehicle. See Exhibit B to Heim Certification.

There is no question that there is no proof to which plaintiff can point to suggest that the MDT's manufactured by Mentor Engineering are inherently dangerous. These wireless dispatching terminals are used not only by AAA, but by police departments, taxi companies, school buses, limousine companies and in various other applications. See Exhibit C to Heim Certification. As such, it is ludicrous for plaintiff to suggest that AAA's decision to utilize MDT's as a means to conduct its dispatching could give rise to a claim for punitive damages. Use of the MDT (which was not even required by AAA) clearly does not evidence an evil minded, willful and wanton disregard for anyone's safety since these units are used safely in a myriad of contexts as evidenced by the information contained in the Mentor Engineering website.

The proofs in the discovery conducted in this matter show without question that there is no connection between any action on the part of AAA-CWJ/MA and the unfortunate accident in this case. Even more strikingly, there can be no basis for the imposition of punitive damages against AACWJ/MA in this case. Accordingly, we respectfully request that plaintiff's Motion be denied in the interest of justice.

Respectfully submitted,
HEIM & MCENROE

Judith A. Heim

JAH:ral
Encls.
cc: Alfred D. Dimiero, Esq.
Michael T. Herbert, Sr., Esq.
Michael A. Graham, Esq.
Stephen L. Hopkins, Esq.
Neil A. Huber/ESO

FILED

AUG 08 2003

BRYAN D. GARRUTO, J.S.C.

**MELLA AND DIMIERO**
**Attorneys At Law**
**820 Morris Turnpike, Suite 103**
**Short Hills, New Jersey 07078**
**(973) 467-9111**
**Attorneys for Plaintiff, Richard Douglas Cannon**

| | |
|---|---|
| RICHARD DOUGLAS CANNON,<br><br>Plaintiff,<br>vs.<br><br>E & D AUTO REPAIR TOWING a/k/a E & D REPAIR, GERARD M. TABER, AMERICAN AUTOMOBILE ASSOCIATION, INC., AAA CENTRAL-WEST JERSEY, A NOT-FOR-PROFIT CORPORATION, AAA MID-ATLANTIC, INC. and JOHN DOE 1-5 being the fictitious names of persons and entities whose true identities are presently unknown,<br><br>Defendants. | SUPERIOR COURT OF NEW JERSEY<br>LAW DIVISION-MIDDLESEX COUNTY<br>DOCKET NO.: L-677-02<br><br>Civil Action<br><br>ORDER |

THIS MATTER having come before the Court on motion of Mella and Dimiero, attorneys for plaintiffs, and the Court having considered the moving papers submitted and supporting Certification, and the Court having considered any papers submitted in opposition, and for good cause having been shown:

IT IS ON this 8 day of August 2003

ORDERED that plaintiff be and is hereby permitted to file a Third Amended Complaint adding a Second Count against defendants, American Automobile Association, Inc., AAA Central-West Jersey, a not-for-profit corporation and AAA Mid-Atlantic, Inc.; and it is further

DENIED

ORDERED that a copy of this Order be served upon all parties within 7 days of the date hereof.

J.S.C.

PAPERS CONSIDERED
✓ Notice of Motion
✓ Movant's Affidavit
✓ Movant's Brief
✓ Answering Affidavits
____ Answering Brief
✓ Cross-Motion
✓ Movant's Reply
____ Other: ________________

Pretrial, Trial, or Calendar Call:

MELLA AND DIMIERO
Attorneys At Law
60 Morris Turnpike, Second Floor
Summit, NJ 07901
(973) 467-9111
Attorneys for Plaintiff, Richard Douglas Cannon

| | |
|---|---|
| RICHARD DOUGLAS CANNON,<br><br>Plaintiff,<br><br>vs.<br><br>E & D AUTO REPAIR TOWING a/k/a E & D REPAIR, GERARD M. TABER, AMERICAN AUTOMOBILE ASSOCIATION, INC., AAA CENTRAL-WEST JERSEY, A NOT-FOR-PROFIT CORPORATION, AAA MID-ATLANTIC, INC. and JOHN DOE 1-5, being the fictitious names of persons and entities whose true identities are presently unknown, FORD MOTOR COMPANY, MENTOR ENGINEERING INC. d/b/a MENTOR, CAMPANA SYSTEMS INC. d/b/a/ CAMPANA and AXIS, and JOHN DOE 6-12, being the fictitious names of persons and entities whose true identities are presently unknown,<br><br>Defendants. | SUPERIOR COURT OF NEW JERSEY<br>LAW DIVISION-MIDDLESEX COUNTY<br>DOCKET NO.: L-677-02<br><br>Civil Action<br><br>**CERTIFICATION OF ALFRED D. DIMIERO, ESQ.** |

ALFRED D. DIMIERO, of full age hereby certifies as follows:

1. I am an Attorney-at-Law of the State of New Jersey and a member of the law firm of Mella and Dimiero, attorneys for plaintiff, Richard Douglas Cannon. I have personal knowledge of the facts set forth herein.

2. This action arises out of a September 6, 2001 accident, which occurred when plaintiff's 1984 Ford Mustang, disabled on Rt. 1 South in Woodbridge, was struck in the rear at more than 50 mph by a 13,000 flat bed tow truck owned by defendant, E & D Auto Repair ("E&D") and operated by defendant, Gerard Taber ("Taber"), E&D's employee.

Upon impact the Cannon Mustang exploded in a fuel-fed fire, which inflicted third-degree burns to more than 50% of Mr. Cannon's body surface area. At the time of the accident, E&D and Taber were responding to an emergency road service call on behalf of defendants, American Automobile Association ("AAA") and AAA Central-West Jersey ("AAACWJ").

3. In addition to E&D, Taber, AAA, AAACWJ and AAA MidAtlantic ("AAAMID"), the other named defendants are Mentor Engineering, Inc., ("Mentor") Campana Systems, Inc. ("Campana") and Ford Motor Company ("Ford")..

4. On January 31, 2007, the return date on which plaintiff's motion to add a punitive damage claim will be argued, Judge Garruto will hear oral argument on summary judgment motions filed on behalf of AAA, Mentor and Campana as well as a partial motion for Summary Judgment filed on behalf of AAACWJ/AAAMID. Those motions have been extensively briefed by the parties. I, on behalf of plaintiff, have filed two briefs:

(a) Plaintiff's Brief in Opposition to the Summary Judgment Motion of American Automobile Association and the Partial Summary Judgment Motion of AAA Central West Jersey; and

(b) Plaintiff's Brief in Opposition to the Summary Judgment Motions of Mentor Engineering, Inc. and Campana Systems, Inc.

Within each of those briefs, I have set forth very detailed factual statements on behalf of plaintiff, with extensive references to relevant documents as well as numerous deposition transcripts, which reference materials are annexed to my Certification filed in response to the summary judgment motions. It is respectfully requested that this Court incorporate by reference the factual statements set forth in plaintiff's opposition to those Summary Judgment Motions, some of which will be referred to herein.

5. Also annexed to my Certification filed in opposition to the summary judgment motions are the *curriculum vitae* and two reports, dated April 7, 2006 and November 7, 2006, of Thomas Dingus, Ph.D. ("Dingus"), plaintiff's expert on, *inter alia*, distracted driving and the integral role of AAA and AAACWJ's digital dispatching practices and procedures in causing the crash.

6. The evidence reveals that the crash occurred because Taber was distracted by a mobile data terminal ("MDT") manufactured by Mentor and sold to AAACWJ by Campana. The MDT in the Taber/E&D truck was owned by AAACWJ and was used by AAACWJ and AAA to dispatch their members' emergency road service calls to E&D.

7. On August 8, 2003, plaintiff moved before this Court for leave to file a Third Amended Complaint asserting a claim for punitive damages against AAA, AAACWJ and AAAMID. At that time discovery was at its early stages, and liability expert reports had not yet been obtained. By Order dated August 8, 2003, annexed hereto as Exhibit "B," this Court had denied plaintiff's motion to bring a punitive damage claim. It is my recollection that Judge Garruto observed at that time that the motion was premature, and to grant it at that stage might lead to discovery abuses.

8. To assist this Court in properly evaluating plaintiff's present entitlement to bring a punitive damage claim against AAA and AAACWJ/AAAMID, a review of Judith A. Heim's July 30, 2003 letter (Exhibit "A" annexed hereto) submitted in opposition to plaintiff's previous motion is helpful, particularly in light of the additional facts and expert opinions produced and developed since the denial of the motion in 2003.

9. In her July 30, 2003 letter opposition, Ms. Heim acknowledged that permission to file amended pleadings "is to be granted liberally,"[1] however, she stated that at that time "there was no good faith basis to the purported pleading."[2] Ms. Heim continued, "there must be circumstances of aggravation or outrage, which may consist of such a conscious and deliberate disregard of the interest of others that the tortfeasor's conduct may be called wanton and willful."[3] Ms. Heim then acknowledged that the standard of "willful and wanton" may be established if the defendant knew or had reason to know of circumstances which would bring home to the ordinary person the highly dangerous character of his or her conduct.[4] Further, she stated that there was no proof that the MDT's manufactured by Mentor were "inherently dangerous," that is was "ludicrous for plaintiff to suggest that AAA's decision to utilize MDT's as a means to conduct its dispatching could give rise to a claim for punitive damages," and that "proofs in the discovery conducted in this matter show without question that there is no connection between any action on the part of AAA-CWJ/MA and the unfortunate accident . . ."[5]

10. It contrast to the scenario described by Ms. Heim in 2003, at present the facts and expert opinions of Dr. Dingus support the punitive damage claim. Those facts are set forth at length in plaintiff's opposition to the summary judgment motions. The following highlights some of them:

[1] p. 1

[2] p. 1

[3] p. 2

[4] p. 2

[5] p. 3

- Constant pressure was exerted by AAA on AAACWJ to bring ERS response times to 30 minutes or less.

- Constant pressure was imposed by AAACWJ on E&D to reduce response times on ERS calls to 30 minutes or less.

- E&D made frequent, safety-related complaints to AAACWJ that AAA and AAACWJ were pushing E&D too hard on the 30 minute response times. Other contractors also complained to AAACWJ.

- Several AAA clubs complained to AAA about the 30 minute response times when that mandatory Quality Standard was being adopted by AAA.

- Some AAA and AAACWJ employees were concerned about the 30 minute response times and safety – some of whom even related it to the Domino's Pizza accidents.

- Four AAACWJ territory managers felt that the 30 minute response times were not realistic.

- AAACWJ implemented digital dispatching and the use of MDT's in trucks, in part to reduce ERS response times. AAA encouraged its clubs, including AAACWJ, to use digital dispatching to reduce response times. AAA endorsed the Mentor MDT's.

- AAA and AAACWJ's high level executives knew that ERS drivers were using the MDTs to respond to AAA emergency road service calls, and the drivers were viewing the MDT screens while driving.

- When Campana trained AAACWJ on the use of digital dispatching, it repeatedly instructed AAACWJ that the MDT's should not be used while the vehicles were in motion.

- In addition, AAACWJ possessed a "users manual" for its digital dispatch system several years prior to the accident which stated, **"CAUTION: DO NOT OPERATE THE MOBILE DATA TERMINAL WHILE VEHICLE IS IN MOTION."** However, AAACWJ never provided that document to its ERS contractors nor did it train or instruct its ERS contractors not to use the MDT's while in motion, despite the fact AAACWJ anticipated that they were using the MDT's while driving.(Bates 9085-9099; Dimiero Certification submitted in opposition to summary judgment motions, Exhibit 24)

- AAA prepared an "AAA ERS Dispatching Communications Assessment, February 12, 1999" which stated at page 15 (Bates 33234; Dimiero Certification, Exhibit 30), **"vehicle operators have to be trained not to**

**watch the mobile data terminal when they are driving or an accident could result . . .**" Emphasis supplied. AAA and AAACWJ failed to instruct the ERS drivers not to watch the MDT when they were driving, despite their anticipation that such activity would occur.

11. In addition, we now have the benefit of the reports of plaintiff's liability expert, Thomas Dingus, Ph.D., an eminent expert on crash analysis, in-vehicle devices and distracted driving, as well as Dr. Dingus's deposition testimony of January 9 and 10, 2007.

12. Dr. Dingus has opined that at the time of the accident Taber was highly distracted, the distraction was due to the MDT, and the distraction was the primary cause of the accident. Dr. Dingus, in his reports of April 7, 2006 and November 7, 2006 directly links the business methods of AAA and AAACWJ – *e.g.* the constant pressure on ERS contractors to respond to calls in 30 minutes or less – to the actual distracting use of the MDT by Taber while his truck was traveling at 50 mph or greater and bearing down on the Cannon Mustang. Among Dr. Dingus's opinions are:

– "The MDT equipment located in Taber's vehicle was defective from a human factors perspective for the purpose of safe operation in a moving vehicle. Specifically, the design of the MDT display and controls creates a set of very complex secondary driving tasks that require a driver to take his or her eyes off of the forward roadway too frequently, and for too long, for safe operation of a motor vehicle." April 7, 2006 report at pp. 5-6

– ". . . it is probable that driver distraction caused by the use of the MDT device was the primary factor leading to the crash in which Mr. Cannon was injured." April 7, 2006 report at p. 5

– "The MDT equipment located in Taber's vehicle was defective from a human factors perspective for the purpose of safe operation in a moving vehicle. Specifically, the design of the MDT display and controls creates a set of very complex secondary driving tasks that require a driver to take his or her eyes off of the forward roadway too frequently, and for too long, for safe operation of a motor vehicle." April 7, 2006 report at pp. 5-6

– ". . . using the MDT in question in a moving vehicle is inherently unsafe . . . using a device such as the MDT in question increases crash risk roughly 300% over normal driving . . ." November 7, 2006 report at pp. 1-2

- "In this case, an administrative rule could have potentially been put in place that originated from AAA, AAACWJ or E&D Auto. Although such controls are often not 100% effective in isolation, they can provide high rates of compliance if administered properly. It seems likely that if AAA and/or AAACWJ had instituted an administrative rule to their preferred service providers stating that the MDT was not to be used while the vehicle was in motion, a reasonable rate of compliance could have been expected (ref: e.g. Pittelkow deposition). In fact, it was clear in the case of E&D Auto, Mr. Taber's employer, that there was a high level of motivation to adhere to AAA's policies (ref: e.g., Savastano deposition)." April 7, 2006 report at p. 9

- "It would be unreasonable to expect E&D Auto to institute such an administrative rule particularly given pressure exerted for AAA and AAACWJ to minimize response times. It is therefore clear that the burden of instituting such a control would fall with AAACWJ or AAA which presents itself as a leader in safe driving . . ." April 7, 2006 report at p. 9

- ". . . when a hazard can not be completely removed or guarded against, and an administrative rule is not implementable or does not result in a 100% compliance rate, . . . the user must be properly trained or at least warned against the hazard and instructed on how to manage it. The MDT distraction hazard was clearly present in Taber's vehicle, yet Taber did not receive training or warning information stating the device should not be used while the vehicle was in motion." April 7, 2006 report at p. 9

- Despite the lack of an appropriate safety evaluation and hazard control strategy, prior to the crash, AAA and AAACWJ clearly encouraged the use of MDTs and endorsed the Mentor MDT (ref: e.g., Lorenz, Ruark, and Mallen depositions) digital dispatching for their ERS activities. It is clear that AAA and AAACWJ policies regarding response time to disabled vehicles encouraged use of the MDT while tow trucks were in motion, at least indirectly. That is, to cut response time, it was common practice for drivers to use the terminals while in motion (ref: e.g., Taber, Savastano depositions). In fact, the AAA response time mandate was apparently so compelling to preferred service providers, like E&D Auto, that is was perceived as a necessity (ref: e.g., Savastano deposition) . . . The methods used by AAA and AAACWJ for conducting their ERS business contributed to the hazardousness of the situation." April 7, 2006 report at p. 11

- "AAA's 2001 distracted driving public policy initiative clearly

> showed an in-depth organization understanding of the driving distraction problem . . . Despite this initiative, AAA neglected to consider distraction caused by the MDT, a device they endorsed and were encouraging their clubs to use (ref: e.g., Pikralladis, Doney depositions). April 7, 2006 report at p. 12

13. It is respectfully submitted that at this time, after much investigation and discovery, the assertion of a punitive damage claim against AAA and AAACWJ must be allowed to go forward.

14. Finally, I respectfully submit that allowing plaintiff to seek a punitive damage award will not delay the trial date. All facts supporting the punitive damage claim have been ascertained. In addition, through discovery, we know that both AAA and AAACWJ are tax paying, not-for-profit entities with strict financial controls and records. In fact, AAACWJ must provide an audited financial statement to AAA every year. It is respectfully submitted that if AAA and AAACWJ produce their financial statements, balance sheets and tax returns from 2001 to 2006, as well as any records they believe reflect on their ability or inability to pay a punitive damage award, plaintiff should have sufficient documentation to assess a reasonable sum of punitive damages, if the jury determines it is warranted. That information is readily available.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

ALFRED D. DIMIERO

DATED: January 19, 2007

# EXHIBIT B

MELLA AND DIMIERO
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(973) 467-9111
Attorneys for Plaintiff, Richard Douglas Cannon

| | |
|---|---|
| RICHARD DOUGLAS CANNON,<br><br>Plaintiff,<br>vs.<br><br>E & D AUTO REPAIR TOWING a/k/a E & D REPAIR, GERARD M. TABER, AMERICAN AUTOMOBILE ASSOCIATION, INC., AAA CENTRAL-WEST JERSEY, A NOT-FOR-PROFIT CORPORATION, AAA MID-ATLANTIC, INC. and JOHN DOE 1-5, being the fictitious names of persons and entities whose true identities are presently unknown, FORD MOTOR COMPANY, MENTOR ENGINEERING INC. d/b/a MENTOR, CAMPANA SYSTEMS INC. d/b/a/ CAMPANA and AXIS, and JOHN DOE 6-12, being the fictitious names of persons and entities whose true identities are presently unknown,<br><br>Defendants. | SUPERIOR COURT OF NEW JERSEY<br>LAW DIVISION-MIDDLESEX COUNTY<br>DOCKET NO.: L-677-02<br><br>Civil Action<br><br>**FIFTH AMENDED COMPLAINT AND JURY DEMAND** |

RICHARD DOUGLASS CANNON, residing at 688 East Grand Avenue, Rahway, County of Union, State of New Jersey, by way of fifth amended complaint against the defendants, says:

**FIRST COUNT**

1. On or about September 6, 2001 plaintiff, Richard Douglas Cannon, was operating a motor vehicle on Rt. 1 South, in the Township of Woodbridge, County of Middlesex, State of New Jersey.

2. On or about September 6, 2001 defendant, E & D Auto Repair Towing a/k/a E & D Repair was the owner of a certain motor vehicle, which was being operated by its agent, servant, employee, and for its benefit by the defendant, Gerard M. Taber, on Rt. 1 South, Woodbridge, New Jersey.

3. On or about September 6, 2001, defendants, E & D Auto Repair Towing a/k/a E & D Repair and Gerard M. Taber, were the agents and/or servants and/or employees and/or acting on behalf of and/or acting for the benefit of and/or acting under the supervision and control of defendants, American Automobile Association, Inc., AAA Central-West Jersey, a not-for-profit corporation, AAA Mid-Atlantic, Inc. and John Doe 1-5 (being the fictitious names of persons and entities whose true identities are presently unknown).

4. At the time and place aforesaid, defendants Gerard M. Taber, E & D Auto Repair Towing a/k/a E & D Repair, American Automobile Association, Inc., AAA Central-West Jersey, a not-for-profit corporation, AAA Mid-Atlantic, Inc. and John Doe 1-5 (being the fictitious names of persons and entities whose true identities are presently unknown) did act in a negligent and careless manner so as to cause the motor vehicle being operated by defendant, Gerard M. Taber, to strike the automobile of the plaintiff, Richard Douglas Cannon.

5. As a direct and proximate result of the aforesaid negligence and carelessness of the defendants, E & D Auto Repair Towing a/k/a E & D Repair, Gerard M. Taber, American Automobile Association, Inc., AAA Central-West Jersey, a not-for-profit corporation, AAA Mid-Atlantic, Inc. and John Doe 1-5 (being the fictitious names of persons and entities whose true identities are presently unknown), plaintiff, Richard Douglas Cannon, sustained severe and permanent injuries, has suffered and permanently will suffer great pain, disability, disfigurement and mental anguish, was forced to seek medical attention, will be forced to seek further medical attention in the future due to the permanent nature of his injuries, has incurred and will incur medical expenses and has been deprived and permanently will be deprived of carrying out his normal activities.

WHEREFORE, plaintiff, Richard Douglas Cannon, demands judgment against the defendants, E & D Auto Repair Towing a/k/a E & D Repair, Gerard M. Taber, American Automobile Association, Inc., AAA Central-West Jersey, a not-for-profit corporation, AAA Mid-

Atlantic, Inc. and John Doe 1-5 (being the fictitious names of persons and entities whose true identities are presently unknown), jointly and severally, together with interest and costs of suit.

**SECOND COUNT**

6. Plaintiff, Richard Douglas Cannon, repeats the allegations of the First Count of the Fifth Amended Complaint as those same were set forth herein at length.

7. Prior to September 6, 2001, defendants, Ford Motor Company and defendants John Doe 6-8, being the fictitious names of persons and entities whose true identities are presently unknown, designed and/or manufactured and/or were product sellers of the 1984 Ford Mustang plaintiff was operating and which, upon information sufficient to form a belief, was further identified by VIN No. 1FABP28A1EF226409.

8. The aforementioned 1984 Ford Mustang was not reasonably fit, suitable or safe for its intended purposes and reasonably foreseeable uses, because it deviated from design specifications, formulae or performance standards of defendants or from otherwise identical units and/or failed to contain adequate warnings or instructions and/or was designed in a defective manner.

9. As a direct and proximate result of the defective 1984 Ford Mustang, on or about September 6, 2001 plaintiff, Richard Douglas Cannon, sustained severe and permanent injuries, has suffered and permanently will suffer great pain, disability, disfigurement and mental anguish, was forced to seek medical attention, will be forced to seek further medical attention in the future due to the permanent nature of his injuries, has incurred and will incur medical expenses and has been deprived and permanently will be deprived of carrying out his normal activities.

10. Prior to September 6, 2001 defendants, Ford Motor Company and defendants John Doe 6-8, being the fictitious names of persons and entities whose true identities are presently unknown, did design, manufacture, test, inspect, and did otherwise take actions and make decisions concerning the 1984 Ford Mustang which exposed the public, and in particular, plaintiff Richard Douglas

Cannon, to an unreasonable risk of injury, in wanton and willful disregard of the rights and safety of plaintiff and the general public.

WHEREFORE, plaintiff, Richard Douglas Cannon, demands judgment against the defendants, Ford Motor Company and John Doe 6-8, being the fictitious names of persons and entities whose true identities are presently unknown, jointly and severally, for compensatory damages, exemplary and punitive damages, together with interest and costs of suit.

**THIRD COUNT**

11. Plaintiff, Richard Douglas Cannon, repeats the allegations of the First and Second Counts of the Fifth Amended Complaint as those same were set forth herein at length.

12. Prior to September 6, 2001, a mobile data terminal ("MDT") which, upon information and belief, was identified further as "EXPRESS MDT," was installed in the 1998 UD Flatbed Wrecker, which was being operated by defendant, Gerard M. Taber.

13. Prior to September 6, 2001, defendants, Mentor Engineering Inc. d/b/a Mentor, Campana Systems Inc. d/b/a/ Campana and AXIS, and defendants John 9-12, being the fictitious names of persons and entities whose true identities are presently unknown, designed and/or manufactured and/or were product sellers of the MDT and the systems by which it operated.

14. The aforementioned MDT and operating systems were not reasonably fit, suitable or safe for their intended purposes and reasonably foreseeable uses, because they deviated from design specifications, formulae or performance standards of defendants or from otherwise identical units and/or failed to contain adequate warnings or instructions and/or were designed in a defective manner.

15. As a direct and proximate result of the defective MDT and its operating systems, on or about September 6, 2001, the motor vehicle being operated by defendant, Gerard M. Taber, struck the Ford Mustang of the plaintiff, Richard Douglas Cannon, as a result of which plaintiff sustained

severe and permanent injuries, has suffered and permanently will suffer great pain, disability, disfigurement and mental anguish, was forced to seek medical attention, will be forced to seek further medical attention in the future due to the permanent nature of his injuries, has incurred and will incur medical expenses and has been deprived and permanently will be deprived of carrying out his normal activities.

16. On and prior to September 6, 2001 defendants, Mentor Engineering Inc. d/b/a Mentor, Campana Systems Inc. d/b/a Campana and AXIS, and defendants John 9-12, being the fictitious names of persons and entities whose true identities are presently unknown, did design, manufacture, test, inspect, and did otherwise take actions and make decisions concerning the MDT and operating system which exposed the public, and in particular, plaintiff Richard Douglas Cannon, to an unreasonable risk of injury, in wanton and willful disregard of the rights and safety of plaintiff and the general public.

WHEREFORE, plaintiff, Richard Douglas Cannon, demands judgment against the defendants, Mentor Engineering Inc., Campana Systems and AXIS, and defendants John 9-12, being the fictitious names of persons and entities whose true identities are presently unknown, jointly and severally, for compensatory damages, exemplary and punitive damages, together with interest and costs of suit.

## FOURTH COUNT

17. Plaintiff, Richard Douglas Cannon, repeats the allegations of the First, Second and Third Counts of this Fifth Amended Complaint as those same were set forth herein at length.

18. On and prior to September 6, 2001 defendants, American Automobile Association, Inc., AAA Central-West Jersey, a not-for-profit corporation, and AAA Mid-Atlantic, Inc. did institute, implement, own, utilize and encourage methods, procedures and equipment for conducting emergency road service operations, which methods, procedures and equipment exposed the public,

and in particular, plaintiff Richard Douglas Cannon, to an unreasonable risk of injury, in wanton and willful disregard of the rights and safety of plaintiff and the general public.

19. As a direct and proximate result of the aforementioned actions of defendants, American Automobile Association, Inc., AAA Central-West Jersey, a not-for-profit corporation, and AAA Mid-Atlantic, Inc., plaintiff, Richard Douglas Cannon, sustained severe and permanent injuries, has suffered and permanently will suffer great pain, disability, disfigurement and mental anguish, was forced to seek medical attention, will be forced to seek further medical attention in the future due to the permanent nature of his injuries, has incurred and will incur medical expenses and has been deprived and permanently will be deprived of carrying out his normal activities.

WHEREFORE, plaintiff, Richard Douglas Cannon, demands judgment against the defendants, American Automobile Association, Inc., AAA Central-West Jersey, a not-for-profit corporation, and AAA Mid-Atlantic, Inc., jointly and severally, for damages, exemplary damages and punitive damages, together with interest and costs of suit.

MELLA AND DIMIERO
Attorneys At Law
Attorneys for Plaintiff

By________________________
ALFRED D. DIMIERO

Dated: January 19, 2007

**CERTIFICATION PURSUANT TO R.4:5-1**

I hereby certify that this matter is not the subject of any other action pending in any Court or pending arbitration proceeding, nor is any other action or arbitration contemplated. All parties known to plaintiff who should have been joined in this action, have been joined.

________________________
ALFRED D. DIMIERO

DATED: January 19, 2007

**DESIGNATED TRIAL ATTORNEY**

**ALFRED D. DIMIERO, ESQ. is designated trial attorney.**

**DEMAND FOR TRIAL BY JURY**

**Plaintiff, Richard Douglas Cannon, hereby demands a trial by jury on all issues.**

**MELLA AND DIMIERO**
**Attorneys At Law**
**Attorney for Plaintiff**
**Richard Douglas Cannon**

**By:________________________**
**ALFRED D. DIMIERO**

**Dated: January 19, 2007**

# EXHIBIT B

FORM C0B
1GJ875673 – GOODMAN & JACOBS ESQS

SUPREME COURT – NEW YORK COUNTY

FEDERAL INSURANCE COMPANY A/S/O AAA MID–ATLANTIC, INC.,

PLAINTIFF

– vs. –

AMERICAN HOME ASSURANCE COMPANY ET ANO,

DEFENDANT

Index No: 601997/07
Date Filed: 06/15/2007
Office No: 06–701
Court Date:

STATE OF NEW YORK, COUNTY OF NEW YORK :SS:

DAVID GOLDBERG being duly sworn, deposes and says;

I am over the age of 18 years, not a party to this action, and reside in the State of New York.

That on 06/15/2007 at 03:01PM at 175 WATER STREET LOBBY , NEW YORK, NY 10270, I served a true copy of the SUMMONS AND COMPLAINT WITH INDEX NUMBER / FILING DATE AFFIXED THEREON upon AMERICAN HOME ASSURANCE COMPANY the DEFENDANT therein named by delivering to, and leaving personally with TOMIKO EDMONDS, AUTHORIZED TO ACCEPT, a true copy of each thereof.

Deponent describes the person served as aforesaid to the best of deponent's ability at the time and circumstances of service as follows:

SEX: FEMALE | COLOR: BLACK | HAIR: BLACK
APP. AGE: 35 | APP HT: 5'4 | APP. WT: 135
OTHER IDENTIFYING FEATURES:

Sworn to before me on 06/18/2007.

HARVEY TAUBER
Notary Public, State of New York
No. 01TA4667012
Qualified in BRONX
Commission Expires 12/31/2010

DAVID GOLDBERG – 916033
AAA ATTORNEY SERVICE COMPANY, INC.
20 VESEY ST., ROOM 1110
NEW YORK, NY 10007
ML

FORM C9B
1GJ875674 – GOODMAN & JACOBS ESQS

**SUPREME COURT – NEW YORK COUNTY**

**FEDERAL INSURANCE COMPANY A/S/O AAA MID-ATLANTIC, INC.,**

PLAINTIFF

– vs. –

**AMERICAN HOME ASSURANCE COMPANY ET ANO,**

DEFENDANT

**Index No: 601997/07**
**Date Filed: 06/15/2007**
**Office No: 06-701**
**Court Date:**

**STATE OF NEW YORK, COUNTY OF NEW YORK :SS:**

**DAVID GOLDBERG** being duly sworn, deposes and says;

I am over the age of 18 years, not a party to this action, and reside in the State of New York.

That on **06/15/2007** at **03:01PM** at **175 WATER STREET LOBBY , NEW YORK, NY 10270**, I served a true copy of the **SUMMONS AND COMPLAINT WITH INDEX NUMBER / FILING DATE AFFIXED THEREON** upon **NATIONAL UNION** FIRE **INSURANCE COMPANY OF PITTSBURGH, PA** the **DEFENDANT** therein named by delivering to, and leaving personally with **TOMIKO EDMONDS, AUTHORIZED TO ACCEPT**, a true copy of each thereof.

Deponent describes the person served as aforesaid to the best of deponent's ability at the time and circumstances of service as follows:

| | | |
|---|---|---|
| **SEX: FEMALE** | **COLOR: BLACK** | **HAIR: BLACK** |
| **APP. AGE: 35** | **APP. HT: 5'4** | **APP. WT: 135** |
| **OTHER IDENTIFYING FEATURES:** | | |

Sworn to before me on **06/18/2007**.

HARVEY TAUBER
Notary Public, State of New York
No. 01TA4667012
Qualified in BRONX
Commission Expires 12/31/2010

DAVID GOLDBERG – 916053
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NEW YORK, NY 10007
ML

# EXHIBIT C

Vinas v. Chubb Corp.
S.D.N.Y.,2007.
Only the Westlaw citation is currently available.
United States District Court,S.D. New York.
Christopher A. VINAS, CPA, and Vinas & Co., CPA's, P.C., Plaintiffs,
v.
The CHUBB CORPORATION, Chubb Group of Insurance Companies, and Federal Insurance Company, Defendants.
**No. 06 Civ. 10233(HB).**

June 14, 2007.

***OPINION & ORDER***

Hon. HAROLD BAER, JR., District Judge.[FN1]

FN1. The Court wishes to thank Shaun Pappas of Cardozo Law School for his assistance researching this opinion.

*1 Plaintiffs Christopher A. Vinas and his accounting firm, Vinas & Co. (collectively, " Plaintiffs" or "Vinas") bring claims against Defendants The Chubb Corporation and related entities Chubb Group of Insurance Companies and Federal Insurance Company (collectively, " Defendants" or "Chubb") for tortious interference with contract, tortious interference with prospective business advantage, and defamation, all under New York law. The case is here on diversity grounds. Chubb moves to dismiss Vinas' complaint in its entirety pursuant to F.R.C.P. 12(b)(6).

For the reasons articulated below, Chubb's motion to dismiss is denied in part and granted in part.

## I. BACKGROUND

### A. *Underlying Facts of Complaint*

The following facts are alleged in Plaintiff's complaint and are taken as true for the purposes of a motion to dismiss. *See, e.g., Bolt Elec., Inc. v. City of New York,* 53 F.3d 465, 469 (2d Cir.1995).

Plaintiff Christopher Vinas is a certified public accountant. Plaintiffs' First Amended Complaint, January 23, 2007 ("Am.Compl.") ¶ 2. Vinas is the sole shareholder and CEO of Vinas & Co., a small accounting company that has generally employed between one and three people during its existence. Am. Compl. ¶¶ 3, 88.

For the fifteen years prior to the events giving rise to this lawsuit, Vinas & Co. was the only accountant for non-party Angeliades, which has had significant growth over those years and is now a large, successful construction company. Am. Compl. ¶¶ 43, 46. Indeed, Mr. Vinas and Mike Angeliades (Angeliades' CEO) had a "friendship." Am. Compl. ¶ 124. By mid-2005, Angeliades' construction company was the major source of income for Vinas & Co. Am. Compl. ¶ 61.

Angeliades, as a regular course of business, procured surety bonds so as to secure contracts to do its construction work. Am. Compl. ¶ 49. Angeliades would procure surety bonds through its surety bond broker, Peter Duffy. ("Duffy"). Am. Compl. ¶ 61, 81. Over the fifteen years prior to the Complaint, Angeliades bought surety bonds from at least five different surety companies. Am. Compl. ¶ 50.

Defendant Chubb is a large insurance corporation that, among other services, provides surety bonds. Am. Compl. ¶¶ 12-13. According to Plaintiffs, Chubb wields great influence in the field, as Chubb provides surety bonds to 78 of America's 400 largest construction companies. Am. Compl. ¶¶ 14-16. According to Plaintiffs, Chubb relies on the integrity and accuracy of a construction company's financial statements when it makes its decision to issue a surety bond. Am. Compl. ¶¶ 52-53.

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In mid-2005, Angeliades purchased a surety bond from Chubb for the first time. Am. Compl. ¶ 61. Sometime after mid-2005, Chubb became the sole surety company from which Angeliades purchased his surety bonds. Am. Compl. ¶ 64. On or about September 9, 2005, Chubb's representative Michael Fleming ("Fleming") telephoned Angeliades' surety bond broker, Duffy, and allegedly told him that Vinas was "too small" and "no good" to do accounting work for Angeliades, and should be replaced.[FN2] Am. Compl. ¶ 83. Duffy conveyed these comments to Angeliades. Am. Compl. ¶ 84. Nevertheless, in early 2006, Angeliades and Vinas contracted for Vinas to prepare Angeliades' 2006 audited financial statements and tax returns. Am. Compl. ¶ 57. Plaintiff alleges that Chubb was aware of their contract, aware that Angeliades was the major source of income to Vinas, and generally aware of the consequences that might befall Vinas were Vinas to lose the Angeliades contract. *See, e.g.,* Am. Compl. ¶ 57, 75, 98, 115.

FN2. Fleming followed up his phone conversation with Duffy with a fax outlining Chubb's requirements for the issuance of surety bonds to Angeliades. Am. Compl. ¶ 85.

*2 On or about April 4, 2006, Fleming repeated the same statements to Duffy that Vinas was "too small" and "no good" to do accounting work for Angeliades, and should be replaced. Am. Compl. ¶ 83. Duffy again conveyed the statements to Angeliades. *Id.* at ¶ 84. On or about August 4, 2006, at a meeting between Angeliades employees and Chubb employees, Fleming repeated the same statements, in the presence of Mr. Angeliades and other Angeliades employees. Am. Compl. ¶ 86.

At some point after this meeting, according to Plaintiff, Chubb threatened to stop providing Angeliades with surety bonds if Angeliades did not replace Vinas as his accountant. Am. Compl. ¶ 67. In September 2006, Chubb indeed refused to provide a surety bond to Angeliades, and thus prevented Angeliades from making a $100 million bid on a construction contract. Am. Compl. ¶ 69.

In November 2006, Angeliades fired Vinas as his accountant and thus breached Vinas' contract to prepare Angeliades' 2006 audited financial statements and tax returns. Am. Compl. ¶ 66.[FN3] Subsequently, Vinas not only lost Angeliades, but two other longtime construction clients as well. Am. Compl. ¶ 116.

FN3. It can be inferred, although it is not entirely made clear in the Complaint, that Angeliades did replace Vinas with an accountant more to Chubb's liking. Am. Compl. ¶ 71.

B. *Plaintiffs' Complaint*

Plaintiffs' Amended Complaint, filed on January 24, 2007, asserts three causes of action against Defendants.[FN4]

FN4. Plaintiffs originally filed this lawsuit in New York state court on September 29, 2006. Defendants removed to federal court on October 23, 2006.
Neither side contests that jurisdiction exists pursuant to the general federal diversity statute, 28 U.S.C. § 1332. According to Plaintiffs, Plaintiff Christopher Vinas is a New York resident and Vinas & Co. is a New York corporation. Am. Compl. ¶¶ 2-3. According to Plaintiffs, Defendant The Chubb Corporation is a New Jersey corporation; the Chubb Group of Insurance Companies is apparently a New Jersey corporation; and **Federal Insurance Company** is an Indiana corporation with its **principal place of business** in New Jersey. Am. Compl. ¶ 4-6.

First, Vinas alleges that Chubb tortiously interfered with Vinas' contract to perform Angeliades' 2006 financials and tax returns. Vinas seeks $98,000 in consequential damages, and punitive damages. Am. Compl. ¶¶ 74-75.

Secondly, Vinas alleges that Chubb tortiously

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interfered with its prospective economic advantage, *i.e.* its future contracts with Angeliades and the two other construction companies who discontinued their business with Vinas. Vinas seeks $450,000 in damages for the loss of its 2007 business; millions of dollars for the loss of prospective business, loss of reputation, and mental pain and suffering over the coming ten to twenty years; and punitive damages. Am. Compl. at 35.

Lastly, Vinas alleges that Chubb committed defamation when Chubb stated that Vinas was "too small" and "no good" to do accounting work for Angeliades. Vinas, as above, seeks $98,000 in consequential damages, $450,000 in damages for the loss of its 2007 business; millions of dollars for the loss of prospective business, loss of reputation, and mental pain and suffering over the coming ten to twenty years; and punitive damages. Am. Compl. at 34.

## II. STANDARD OF REVIEW

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the movant must establish that the plaintiff has failed to "state a claim upon which relief can be granted." Fed.R.Civ.P. 12(b)(6). In ruling on a Rule 12(b)(6) motion, this Court must construe all factual allegations in the complaint in favor of the non-moving party. *See Krimstock v. Kelly,* 306 F.3d 40, 47-48 (2d Cir.2002). A motion to dismiss should not be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Shakur v. Selsky,* 391 F.3d 106, 112 (2d Cir.2004), *quoting McEachin v. McGuinnis,* 357 F.3d 197, 200 (2d Cir.2004).

## III. DISCUSSION

***3** I will address Vinas' three claims-tortious interference with contract, tortious interference with prospective business advantage, and defamation-in turn. The parties do not dispute that New York law applies to all three claims. *See, e.g., American Protein Corp. v. AB Volvo,* 844 F.2d 56, 62 (2d Cir.1988) (holding that New York law applies to tortious interference claim where alleged tort occurred in New York and involved New York corporation).

### A. *Tortious Interference with Contract Claim*

Under New York law, the elements of a tortious interference with contract claim are: "(a) that a valid contract exists; (b) that a 'third party' had knowledge of the contract; (c) that the third party intentionally and improperly procured the breach of the contract; and (d) that the breach resulted in damage to the plaintiff." *Albert v. Loksen,* 239 F.3d 256, 274 (2d Cir.2001), *citing Finley v. Giacobbe,* 79 F.3d 1285, 1294 (2d Cir.1996). Where the third party has an "economic interest" in the contract, however, a plaintiff must make a higher showing-i.e., that the third party's interference was " either malicious or involved conduct rising to the level of criminality or fraud." *Masefield AG v. Colonial Oil Indus.,* 2006 U.S. Dist. LEXIS 5792, at *15-16 (S.D.N.Y.2006) (*"Masefield"* ) (collecting cases).

This "economic interest" defense, as articulated recently by the New York Court of Appeals, applies to a third party that "act[s] to protect its own legal or financial stake in the breaching party's business." *White Plains Coat & Apron Co., Inc. v. Cintas Corp.,* 8 N.Y.3d 422, 2007 N.Y. LEXIS 847, at *5 (N.Y. Apr. 26, 2007) (*"White Plains Coat"* ).FN5 Accordingly, the "economic interest" defense has been applied in situations "where defendants were significant stockholders in the breaching party's business; FN6 where defendant and the breaching party had a parent-subsidiary relationship; FN7 where defendant was the breaching party's creditor; FN8 and where the defendant had a managerial contract with the breaching party at the time defendant induced the breach of contract with plaintiff." FN9 *White Plains Coat,* 2007 N.Y. LEXIS 847, at *5-6.

FN5. Although the Court of Appeals decided *White Plains Coat* after the parties briefed Chubb's motion to dismiss, the parties subsequently brought the decision

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to this Court's attention.

FN6. *See White Plains Coat,* 2007 N.Y. LEXIS 847, at *5-6, *citing, e.g., Felsen v. Sol Cafe Mfg. Corp.,* 249 N.E.2d 459 (N.Y.1969); *Foster v. Churchill,* 665 N.E.2d 153, 157 (N.Y.1996).

FN7. *See White Plains Coat,* at *5-6, *citing, e.g., American Protein Corp. v. AB Volvo,* 844 F.2d 56, 63 (2d Cir.1988).

FN8. *See White Plains Coat,* at *5-6, *citing Ultramar Energy Ltd. v. Chase Manhattan Bank, N.A.,* 179 A.D.2d 592, 592-593 (N.Y.App.Div.1992).

FN9. *See White Plains Coat,* at *5-6, *citing Don King Productions, Inc. v. Smith,* 47 Fed. Appx. 12, 15-16 (2d Cir.2002) (unpublished) (Court upheld jury verdict that rejected tortious interference claim by plaintiff boxing promotion company against defendant boxing manager who induced boxer to breach promotion contract with plaintiff promotion company).

Here, Vinas' tortious interference claim turns on whether Chubb may successfully assert the "economic interest" defense. The central question, which appears to be one of first impression, is whether a surety bond issuer's interest in the financial viability and integrity of the third-party construction company to which it issues surety bonds is a sufficient "legal or financial stake" in the breaching party's business to assert successfully the "economic interest" defense.

Chubb argues that it has a direct financial interest in the integrity of Angeliades' financials, and thus Angeliades' choice of accountant, because "a surety, in issuing a performance bond, undertakes the risk that the contractor will be unable to complete the project or to absorb any losses that may occur in the performance of the contract." [FN10] *United States Fid. & Guar. Co. v. Braspetro Oil Servs. Co.,* 369 F.3d 34, 41 n.3 (2d Cir.2004).[FN11] Before a surety issues a bond, it typically "will have undertaken a rigorous investigation of the contractor's financial condition and relevant prior experience." *Id.* Thus, Chubb argues, because Chubb's economic well-being is directly tied to Angeliades' financial condition, and indirectly to Angeliades' accountants who prepare reports of that financial condition, Chubb is entitled to the defense and may induce Angeliades to breach its contract with its accountant Vinas (at least if no malice, criminality, or fraud exists).

FN10. *See, e.g.,* Transcript of Oral Argument, May 2, 2007, at 5 (Defendant: " If the company stops paying its bills or goes belly up, the surety is going to have to pay a lot of money.").

FN11. Vinas' complaint appears to support this contention. Vinas alleges that " sureties, including Chubb, based their decisions as to whether or not to issue said Surety Bonds upon the integrity and accuracy of Angeliades' audited financial statements and tax returns as prepared by the plaintiffs." Pl. Compl. ¶ 52-53.

***4** Vinas counters that courts have typically applied the "economic interest" defense in situations where defendant had a direct, existing financial stake in the breaching party, such as a shareholder or board member of a company, or a parent-subsidiary relationship, as distinguishable from the more indirect and attenuated surety bond issuer-contractor relationship in the case at bar. *See White Plains Coat,* 2007 N.Y. LEXIS 847, at *5-6 n.6, *6 n.7 (collecting cases). Chubb points out, however, that courts have not limited the "economic interest" defense to direct ownership situations. *See Don King Productions, Inc. v. Smith,* 47 Fed. Appx. 12, 15-16 (2d Cir.2002) (unpublished) ("Such economic interest ... is not limited to that of the breaching party, but can include that of the [defendants'] as well.... [Plaintiff] argues that this reasoning only applies where the defendant has an ownership interest in the breaching party. But there is nothing in [*Felsen* ], or in any other cases ... that suggests such a limitation."), [FN12] *citing Felsen v. Sol Cafe Mfg. Corp.,* 249 N.E.2d 459; *see also Masefield,* 2006 U.S. Dist. LEXIS 5792, at *15 ("

Although many of the cases involving the economic interest defense in the context of a tortious interference with contract claim have involved parent-subsidiary relationships, the Court is aware of no authority suggesting that the defense should be limited to that circumstance."), *citing Night Hawk Ltd. v. Briarpatch Ltd., L.P.*, 2003 U.S. Dist. LEXIS 23179, at *6-7 (S.D.N.Y.2003) (relationship between defendants and breaching third parties was that of competitors, not parent-subsidiary).FN13 Indeed, at least one Court has instead termed the " economic interest" defense the "self-interest exception." *See Imtrac Indus. v. Glassexport Co.*, 1996 U.S. Dist. LEXIS 1022, at *22 (S.D .N.Y.1996).

FN12. Although *Don King Productions* is unpublished, because the Court of Appeals relied upon it in articulating the contours of the "economic interest" defense under New York law, *see White Plains Coat*, at *5-6, I will cite it here.

FN13. It should be noted that the *White Plains Coat* Court subsequently rejected the use of the "economic interest" defense by a defendant who was merely plaintiff's competitor. *See White Plains Coat* at *7 (" A defendant who is simply plaintiff's competitor and knowingly solicits its contract customers is not economically justified in procuring the breach of contract .... [M]ere status as plaintiff's competitor is not a legal or financial stake in the breaching party's business that permits defendant's inducement of a breach of contract.").

Although the instant question is one of first impression, Chubb's situation is perhaps most closely analogous to that of the defendant creditor who qualified for the "economic interest" defense in *Ultramar Energy Ltd. v. Chase Manhattan Bank, N.A.*, 179 A.D.2d 592, 592-593 (N.Y.App.Div.1992) (*"Ultramar"* ), *cited approvingly, White Plains Coat*, at *5-6. In *Ultramar*, the defendant enforced a security agreement against its debtor by receiving and retaining accounts receivable owed to the debtor by other parties, thus causing debtor to breach its contract with plaintiff. The *Ultramar* defendant qualified for the "economic interest" defense. *Ultramar* at 593. Still, Vinas argues that unlike *Ultramar*, Chubb's interest in Angeliades is not a present interest-but rather, a prospective interest that does not become an "existing legal and financial interest" until, if, and when Angeliades defaults on its surety bond.FN14

FN14. *See* Transcript of Oral Argument, May 2, 2007, at 28 (Plaintiff: "... [T]he fact of the matter is a surety is only something in the prospective.").

On this motion to dismiss, construing Plaintiff's alleged facts in their most favorable light, I cannot conclude as a matter of law that Chubb, by dint of its issuance of a surety bond to Angeliades, qualifies for the "economic interest" defense. The development of facts through discovery may serve to illuminate several aspects of the nature of the relationship between Chubb and Angeliades, such as the degree of reliance by Chubb on the quality of Angeliades' financials. Because Chubb does not, as a matter of law at this stage, qualify for the " economic interest" defense that would force Vinas to make a greater showing of malice, criminality, or fraud, Chubb's motion to dismiss Vinas' tortious interference claim is denied.FN15

FN15. Were Chubb to qualify for the " economic interest" defense, it is highly unlikely that Vinas' tortious interference claim would survive, as Vinas alleges no facts, aside from conclusory allegations, that support an inference of malice or " conduct rising to the level of criminality or fraud." *See* Section B., *infra* .

### B. *Tortious Interference with Prospective Economic Advantage Claim*

*5 Vinas' second claim against Chubb is for Chubb's interference with Vinas' future contracts (i.e. Vinas' "prospective business advantage"). To

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state a claim, Vinas must allege that: (1) there was a business relationship with a third party; (2) defendant "knew of that relationship and intentionally interfered with it"; (3) defendant either acted "solely out of malice" or used wrongful means; and (4) defendant's "interference caused injury to the relationship" with the third party. *Masefield,* 2006 U.S. Dist. LEXIS 5792, at *25, *citing Carvel Corp. v. Noonan,* 350 F.3d 6, 17 (2d Cir.2003).

As is evident, Vinas must make a greater showing of "malice" or "wrongful means" here, regardless of whether or not Chubb possesses an "economic interest." "Because 'greater protection is accorded an interest in an existing contract ... than to the less substantive, more speculative interest in a prospective relationship,' courts require 'proof of more culpable conduct on the part of the interferer' to impose liability on defendants who interfere with prospective business relationships than they require to impose liability on defendants who interfere with existing contracts." *Masefield,* 2006 U.S. Dist. LEXIS 5792, at *25-26; *see also White Plains Coat,* 2007 N.Y. LEXIS 847, at *4-5.

At the outset, Chubb points out, and Vinas does not dispute, that although Vinas cites to the fact that he lost two other clients aside from Angeliades because of Chubb's actions, Vinas does not allege that Chubb knew of these other two contractual relationships. Thus, Vinas' claims regarding these two unknown clients are dismissed.

Regarding Vinas' future contracts with Angeliades, Vinas' claim that Chubb interfered with those contracts turns on whether Vinas alleges in non-conclusory fashion that Chubb acted "solely out of malice" or used "wrongful means."

Vinas does not allege, aside from conclusory allegations, that Chubb acted "solely out of malice." Indeed, Chubb's economic motivation, even if somewhat attenuated from the Vinas-Angeliades relationship, counsels against such a finding of malice. *See, e.g ., A & A Jewellers Ltd. v. Bogarz, Inc.,* 2005 U.S. Dist. LEXIS 33873, at *5 (W.D.N.Y.2005) ("Actions taken, at least in part, to promote or advance [defendant's] economic self-interest are, by definition, not taken for the sole purpose of harming [plaintiff]."); *Imtrac Indus. v. Glassexport Co.,* 1996 U.S. Dist. LEXIS 1022, at *23 (S.D .N.Y.1996) (the "hope of economic gain" does not alone constitute malice), *citing Inn Chu Trading Co. v. Sara Lee Corp.,* 810 F.Supp. 501, 506 (S.D.N.Y.1992).

Vinas is thus left to argue that Chubb used " wrongful means" when it interfered with its prospective business. To establish "wrongful means, " as a general rule, "the defendant's conduct must amount to a crime or an independent tort ..." *Masefield,* 2006 U.S. Dist. LEXIS 5792, at *25, *citing Carvel Corp. v. Noonan,* 818 N.E.2d 1100, 1103 (N.Y.2004). Vinas notes that "wrongful means " may include "some degrees of economic pressure," if such pressure is "extreme and unfair." *Masefield* at *28, *citing Carvel Corp. v. Noonan,* 818 N.E.2d at 1105. It is unclear what (if any) distinction there is between "extreme and unfair" and "tortious or criminal" economic pressure.[FN16] In any event, although Chubb certainly exerted some pressure upon Angeliades to drop Vinas, I cannot say that that pressure alleged by Vinas was "extreme" in a manner approaching a separate crime or tort. *See Masefield* at *28 (where plaintiff claimed that defendant pressured third-party breacher to "either raise the price of the cargos ... or cancel the Contract," such conduct was not "extreme and unfair," tortious, or criminal).[FN17]

FN16. "It is not clear what "extreme and unfair" means, and whether economic pressure can be "extreme and unfair" without being tortious and criminal." *Masefield* at *28, *citing Carvel Corp. v. Noonan,* 818 N.E.2d at 1105.

FN17. Vinas also argues that Chubb's conduct amounts to the independent tort of defamation. This argument is entirely derivative of Vinas' defamation claim, and fails along with it. *See* Section C., *infra.*

*6 Accordingly, Chubb's motion to dismiss Vinas' claim for tortious interference with prospective business advantage is granted.

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C. *Defamation Claim*

Under New York law, Vinas must show four elements to state a claim for defamation: (1) a false and defamatory statement of fact; (2) regarding the plaintiff; (3) published to a third party by defendants; and, (4) resulting in injury to the plaintiff. *See DelleFave v. Access Temporaries, Inc.*, 2001 WL 25745, at *3 (S.D.N .Y.2001), *citing Weldy v. Piedmont Airlines, Inc.*, 958 F.2d 57, 61 (2d Cir.1993).

Vinas argues that Chubb's statements that he was " too small" and "no good" are defamatory.[FN18] Chubb, however, avers that these statements are opinion, not fact, and thus cannot be "false" as a matter of law. "New York law absolutely protects statements of 'pure opinion,' such that they can never be defamatory." *Kirch v. Liberty Media Corp.*, 449 F.3d 388, 402 (2d Cir.2006). Whether a statement is "opinion" or "fact" depends on four factors: "(1) whether the specific language in issue has a precise, readily understood meaning or whether it is indefinite and ambiguous; (2) whether the statement is capable of being objectively characterized as true or false; (3) an examination of the full context of the communication in which the statement appears; and (4) a consideration of the broader social context or setting surrounding the communication, including the existence of any applicable customs or conventions which might signal to readers or listeners that what is being read or heard is likely to be opinion, not fact." *See Kirch v. Liberty Media Corp.*, 449 F.3d 388, 402 (internal citations omitted), *citing Steinhilber v. Alphonse*, 501 N.E.2d 550, 554 (N.Y.1986).[FN19]

FN18. Chubb argues, and Plaintiff does not challenge, that Vinas cannot state a claim based on the first allegedly defamatory statement in September 2005, because the one-year statute of limitations has expired. *See* N.Y. C.P.L.R. § 215(3).

FN19. The "opinion/fact" inquiry is a question of law for the court. *Celle v. Filipino Reporter Enters.*, 209 F.3d 163, 178 (2d Cir.2000).

Here, Chubb argues that their statements that Vinas was "too small" and "no good" were subjective, cannot be proven "true" or "false," and are thus non-actionable statements of opinion. *See Shernoff v. Soden*, 2006 U.S. Dist. LEXIS 70410, at *8 (N.D.N.Y.2006) (collecting cases), *citing, e.g., Steinhilber v. Alphonse*, 501 N.E.2d 550, 554 (statements calling union member "scab" are statements of opinion); *Parks v. Steinbrenner*, 131 A.D.2d 60, 64-65 (N.Y.App.Div.1987) (statements calling baseball umpire "not capable" and accusing him of "misjudg[ing] plays" are opinion). Vinas provides several arguments in response, none of which are particularly persuasive.

First, Vinas argues that the "fact" that its accounting work was "good" can be proven "true" or "false," as it prepared and audited financial statements in compliance with objective accounting standards. This argument is unavailing. By analogy, a baseball umpire must perform in compliance with objective umpiring standards (i.e., to correctly enforce the rules of the game), yet to call an umpire "not capable" is non-actionable opinion, not fact. *See generally Parks v. Steinbrenner*, 131 A.D.2d 60, 64-65.

*7 Secondly, Vinas argues that Chubb's statements implied that Chubb knew certain undisclosed facts, and thus are actionable statements of "mixed opinion." *See Steinhilber v. Alphonse*, 501 N.E.2d 550, 553. Yet it is unclear what facts, exactly, Chubb would have known to support their assertion that Vinas was "too small" or "no good" that its audience (i.e. Angeliades, Vinas' client) did not know itself. Indeed, it is uncontested that Vinas' accounting company was in fact small, as it employed no more than three people.

Lastly, Vinas argues for "defamation by implication "-that the real but implied import of Chubb's statement that Vinas was "no good" was that Vinas was "too close" to Angeliades, and further impliedly, was "cooking [Angeliades'] books," and that a reasonable surety bond broker would reach that inference as well. *See November v. Time, Inc.*, 13 N.Y.2d 175, 178-79 (N.Y.1963) ("The words are to be construed ... as they would be read and understood by the public to which they are

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addressed.") However, the levels of attenuation within Chubb's purported "implication" cast doubt on the "reasonable" inferences Vinas argues should be drawn from Chubb's statements. (Notably, Plaintiff does not allege that Chubb said that Vinas was "too close"-he alleges that Chubb said Vinas was "no good," which supposedly implies Vinas was "too close," which supposedly implies Vinas was "cooking the books.")

Moreover, for such "defamation by implication" claims, Plaintiffs typically have to show that Defendants affirmatively intended such implication. *See Rappaport v. VV Publishing Corp.,* 618 N.Y. S.2d 746 (N.Y.Sup.Ct.1994) ("The language must ... affirmatively suggest that the author intends or endorses the inference."). Vinas alleges no facts that suggest that Chubb affirmatively intended to imply that Vinas was unethically or illegally "cooking the books"-only that Vinas was, as Chubb apparently stated, either "too small" or "no good."

Because Chubb's allegedly defamatory statements are non-actionable opinion, rather than fact, Chubb's motion to dismiss Vinas' defamation claim is granted.

## IV. CONCLUSION

For the foregoing reasons. Chubb's motion to dismiss Vinas' tortious interference with contract claim is DENIED. Chubb's motion to dismiss Vinas' claim for tortious interference with prospective business advantage is GRANTED. Chubb's motion to dismiss Vinas' defamation claim is GRANTED.

The Clerk of the Court is directed to close this motion and remove it from my docket.

**SO ORDERED.**

S.D.N.Y.,2007.
Vinas v. Chubb Corp.
Slip Copy, 2007 WL 1741858 (S.D.N.Y.)

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